BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules for the	)	IB Docket No. 98-21
Direct Broadcast Satellite Service	)	

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REPLY COMMENTS OF TIME WARNER CABLE

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SUMMARY

The overwhelming majority of commenters, representing the DBS, cable, telephone and public interest spheres, have resoundingly stated their opposition to an outright cable/DBS cross-ownership prohibition. Several compelling reasons were cited. First, such a measure would be inconsistent with the flexibility intentionally built into the DBS rules, flexibility designed to increase, not retard, development and investment in DBS services. Second, because there would be only few cases, if any, of DBS-cable cross-ownership to consider, there is little to be gained in increased future predictability from such an outright ban. Third, with the availability and past success of Commission case-by-case monitoring of DBS ventures, operating in conjunction with active antitrust enforcement by the Department of Justice or Federal Trade Commission, adoption of an outright cross-ownership ban is regulatory overkill. Finally, and most importantly, an absolute prohibition would likely foreclose efficient, pro-competitive business combinations and would deny the public the competitive and service quality benefits of such combinations. The best solution is to instead review each proposed combination on its own merits on a case-by-case basis, taking into account the unique technological and structural circumstances each particular application presents.

However, a few commenters have attempted to use the Commission's 1997 decision preventing cable operators and LECs from obtaining LMDS licenses as precedential authority in support of their call for a cable/DBS cross-ownership ban. These arguments are unfounded. The Commission's treatment of LMDS licensing provides no precedential support for preventing cable operators from also owning interests in DBS licensees. Any attempt to draw an analogy between cable ownership of LMDS and DBS licenses ignores several fundamental

differences between DBS and LMDS. First, LMDS is a local service while DBS is a nationwide service. Second, the hypothetical abuses surrounding potential withholding of programming by a cable affiliated DBS operator have been addressed through consent decrees and Sec. 628 of the Act. Third, LMDS is in its infancy, while there are several DBS providers with deep pockets and growing subscribership. Finally, PRIMESTAR's reorganization as a public company creates structural barriers to prevent any attempt to shield a particular cable investor's systems from full competition by PRIMESTAR.

To the extent the Commission's primary concern is horizontal concentration among MVPD providers, the Commission should be mindful that a Federal district court has found similar MVPD ownership limitations to be unconstitutional. Indeed, adoption of a cable/DBS cross-ownership ban would be indistinguishable from a First Amendment standpoint in that it would burden substantially more speech than necessary without leaving open ample alternative means for cable operators to reach this potential audience, and therefore would also be unconstitutional.

The Commission should retain maximum flexibility to address issues relating to foreign control of DBS licensees on a case-by-case basis. Such an approach would allow for a careful analysis of the unique facts of each situation. Moreover, the Commission should reaffirm that even if Sec. 310(b) of the Act does not mandate foreign ownership restrictions on DBS licensees operating on a subscription basis, the Commission nevertheless retains discretion to consider foreign ownership issues as part of its general public interest mandate applicable to all licensing proceedings. In particular, even if the Commission concludes that the traditional statutory policies underlying Section 310(b) of the Act are inapplicable to subscription DBS, the Commission should nevertheless retain the discretion to review DBS license applications in light of current Commission policies relating to foreign ownership. In light of actions by the U.S. trade negotiators in the recent WTO agreement to exempt DBS and DTH satellite services, the Commission should adopt an ECO-Sat test whereby a foreign-controlled entity can obtain a U.S. DBS license only if its home nation offers equivalent competitive opportunities to U.S. firms seeking to provide DBS service in such nation.

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REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P. ("TWE"), hereby submits these reply comments in the above referenced proceeding. Time Warner operates cable television systems across the United States, and affiliates of TWE, together with its partner Advance/Newhouse, hold a combined 30 percent equity interest in PRIMESTAR, Inc. ("PRIMESTAR"), a Direct Broadcast Service ("DBS") provider.

I. The Commission Should Not Adopt A Cable/DBS Cross-Ownership Ban

a. There is a Consensus Among the Commenters Opposing a Cable/DBS Cross-Ownership Ban

The overwhelming majority of commenters, representing a cross-section of interests, are opposed to an across-the-board cable/DBS cross-ownership ban. Indeed, in their comments, representatives from the DBS, cable, telephone and public interest spheres all resoundingly stated their opposition to an outright prohibition:

- DIRECTV - "[A] *per se* cable/DBS cross-ownership ban is a harsh measure that generally is inconsistent with the flexibility that has characterized DBS service regulation. . . If the Commission is vigorous in its monitoring and, if necessary, modification or prohibition of specific transactions, there is no need for the introduction of a blanket ownership prohibition."[1]

- PRIMESTAR - "[C]ross-ownership limitations of general applicability raise the very significant possibility that ownership interests that would in fact serve the public interest are never even considered, to the detriment of the targeted class of potential owners, consumers, and the public. Continuing the Commission's 'longstanding commitment to a flexible regulatory structure for DBS service' will ensure that the Commission will have the opportunity to approve transactions that serve the public interest. Proceeding to the adoption of a general rule on DBS ownership will only sacrifice beneficial transactions in the name of predictability."[2]

- National Cable Television Association - "Proposals to impose DBS-cable cross-ownership bans have been rejected by both Congress and the FCC in the past. And there are no new circumstances which warrant revisiting those conclusions. Indeed, since Congress and the FCC have refused to adopt such cross-ownership provisions when DBS was in its infancy but its potential to compete with cable was evident, it would make no sense now, in light of the phenomenal recent growth of DBS, to adopt such rules."[3]

- BellSouth - "[T]here may be scenarios in which a party's affiliation with a cable operator, standing alone, would pose no public interest concern. In such circumstances, it would make little sense to deprive consumers of the benefits that might be realized from a particular alliance or assignment of DBS frequencies through blind adherence to a *per se* rule. . . In the final analysis, BellSouth believes that a cross-ownership restriction is among the most onerous regulatory tools that the Commission possesses. Such a ban should be implemented only in the rarest of circumstances. If the Commission exercises its authority and resolves to aggressively police transactions that threaten emerging MVPD competition . . . then there is no need for a blanket prohibition."[4]

- Ameritech - "[R]ather than adopt broad, inflexible DBS cross-ownership rules that could inadvertently limit DBS's potential, on its own or in combination with other technologies and video service providers, to become a significant competitive alternative to incumbent cable, the Commission should retain regulatory flexibility to address in specific cases competition and public interest concerns relating to DBS ownership. This approach would not only be consistent with the deregulatory objectives of the Telecommunications

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[1]DIRECTV Comments at 11.

[2]PRIMESTAR Comments at 9.

[3]National Cable Television Association Comments at 5.

[4]BellSouth Comments at 4-5.

Act of 1996 ("1996 Act"), but also would permit the Commission to take into account technological developments and structural changes in the MVPD market that may affect DBS's competitiveness, as well as to assess the potential effects of transactions affecting DBS ownership on the other new entrants."[5]

- United Church of Christ and Consumers Union - "UCC, et al. see little reason to adopt a blanket rule prohibiting cross-ownership. . .[and] thus agree, albeit for different reasons with Commissioners Furchtgott-Roth and Powell, that it is unnecessary to adopt a specific cable/DBS cross-ownership rule."[6]

In reviewing this chorus of opposition to a blanket cross-ownership ban, it is evident that adoption of such a restriction would be unwarranted for several reasons. First, such a draconian measure would be inconsistent with the flexibility intentionally built into the DBS rules, flexibility designed to increase, not retard, development and investment in DBS services.[7] Second, because there would be only few cases, if any, of cable/DBS cross-ownership to consider in the future due to the limited number of available satellite orbital slots licensed by the FCC, there is little to be gained in increased future predictability from such an outright ban.[8] Third, with the availability and past success of Commission case-by-case monitoring of DBS ventures operating in conjunction with active antitrust enforcement by the Department of Justice or Federal Trade

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[5]Ameritech Comments at 4.

[6]United Church of Christ and Consumers Union Comments at 3.

[7]The tremendous risk associated with starting a DBS operation creates incentives for most future DBS licensees to be consortiums of entities joined together to share the risks of start-up and to pool their individual expertises. Therefore, it is likely that the ownership of future DBS licensees will become increasingly complicated, rendering a general rule unduly rigid and unable to account for unique situations. As such, there is no need for a general rule regarding DBS cross-ownership, when such a rule would be of extremely limited value, if any.

[8]Due to the limited number of high-power DBS orbital slots allocated to the United States by international treaty, it is unlikely that the Commission will be presented with any significant number of DBS cross-ownership cases.

Commission, adoption of an outright cross-ownership ban is simply regulatory overkill. Finally, and most importantly, an absolute prohibition would likely foreclose efficient, pro-competitive business combinations and would deny the public the competitive and service quality benefits of such combinations.[9] The best solution is to instead review each proposed combination on its own merits on a case-by-case basis taking into account the unique technological and structural circumstances each particular application presents.

b. The Adoption of LMDS Ownership Restrictions Does Not Support Adoption of a Cable/DBS Cross-Ownership Ban

Several commenters attempt to use the Commission's 1997 decision preventing cable operators and LECs from obtaining LMDS licenses as precedential authority for banning cable/DBS cross-ownership.[10] Specifically, both DIRECTV and EchoStar state that the Commission's decision to impose a cable/LMDS cross-ownership ban was based on PRIMESTAR's past conduct.[11] DIRECTV and EchoStar's claim is nonsense. Moreover, the Commission's treatment of LMDS licensing clearly provides no precedential support for

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[9]Even EchoStar, which supports a cable-DBS cross-ownership ban in principle, argues that if the PRIMESTAR applications are granted, that no ban should be adopted. EchoStar Comments at 5. Such an argument only exposes the transparency of EchoStar's comments in this proceeding as really nothing more than a complementary pleading to its rabid PRIMESTAR opposition, and in substance only demonstrates the folly of the Commission adopting a general rule banning all cross-ownership in the future.

[10] *See* DIRECTV comments at 8-11, EchoStar comments at 4. *See also, Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-20.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services* (Second Report and Order) CC Docket No. 92-297 (released March 13, 1997) ("LMDS Order"), *aff'd Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998).

[11]*Id.*

preventing cable operators from also owning interests in DBS licensees. Any attempt to draw an analogy between cable ownership of LMDS and DBS licenses ignores several fundamental differences between DBS and LMDS.

First, LMDS, by definition, is a local service while DBS is a national service. Absent the current cable/LMDS cross-ownership ban, a cable operator theoretically could derive a benefit from warehousing spectrum or otherwise failing to aggressively market LMDS service in a particular area.[12] In such case, consumers in the affected area would be deprived of the full benefits of LMDS service.[13] But any such concerns do not apply to a national service, as is the case with DBS. If a cable-affiliated DBS licensee failed fully to exploit that spectrum, the two existing full CONUS DBS providers, DIRECTV and EchoStar, stand ready to provide service to the consumer.

The cable/LMDS cross-ownership ban applies to the A Block LMDS license. The A Block is the only LMDS licence capable of supporting MVPD service.[14] If the incumbent cable operator owned the A Block LMDS license in a geographic area it served, it would not be possible for any other entity to provide a LMDS-based MVPD service in that area. The same is not true with respect to DBS service. As stated by the Commission in its 1995 DBS Order:

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[12]Of course, the Commission could have easily dealt with this concern in a much more narrowly targeted fashion, such as through a short construction deadline.

[13]In this respect, LMDS is similar to MMDS where there historically has been a cable ownership ban to avoid warehousing of spectrum. However, even with respect to MMDS, the cable ownership ban has been relaxed as effective competition develops.

[14]There are two LMDS licenses in each market. One license, in frequency Block A, authorizes service on 1,150 megahertz of spectrum. The second license, in frequency Block B, authorizes service on 150 megahertz of spectrum. "[T]he 150 megahertz license provides inadequate capacity to enable the provision of attractive MVPD service." LMDS Order at ¶ 182.

> Even if a cable-affiliated MVPD with market power were to acquire the permit for the full-CONUS channels available at 110 , two other full-CONUS locations -- largely occupied by independent DBS providers -- would remain. The presence of these other providers severely constrains the strategic activities of an MVPD-DBS combination, since even if it chooses not to make full use of its DBS channels, consumers will have at least two other competitive sources of DBS service from which to choose.[15]

In addition to the two fully operational high-power DBS services, there are numerous other options for providing DTH video service. As fully discussed in PRIMESTAR's comments, the advancement of technology and market forces will provide additional solutions to the limited number of DBS orbital positions assigned to the United States today.[16]

Second, a cable/DBS cross-ownership ban is not necessary to address the concerns raised by the State Attorneys General and the Department of Justice several years ago as to PRIMESTAR, because these concerns have been adequately addressed by both consent decree and federal law. As stated in the Commission's LMDS Order, the concerns raised by the State Attorneys General and the Department of Justice involved the potential for restrictions on cable programming access by distributors that compete with the cable MSOs. In 1994, PRIMESTAR and its cable affiliates entered into comprehensive consent decrees with both the State Attorneys General and the Department of Justice.[17] Furthermore, Section 628 of the Communications Act codifies the obligations of cable operators to make their programming available to any unaffiliated

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[15]*Revision of Rules and Policies For the Direct Broadcast Satellite Service* (Report and Order) 11 FCC Rcd 9712 (1995) at ¶ 73.

[16]PRIMESTAR Comments at 10-13.

[17]*United States v. Primestar Partners*, 1994-1 Trade Cas. (CCH) 70,562 (SD NY 1994); *State of New York ex rel. Abrams v. Primestar Partners*, 1993-2 Trade Cas. (CCH) 70,403 (SD NY 1993).

MVPD.[18] As such, the concerns raised in the PRIMESTAR consent decrees have been fully addressed in the context of DBS service and do not need to be addressed through the blunderbuss of a cable/DBS cross-ownership ban.

In addition, any concerns relating to the hypothetical incentives of cable operator investors in PRIMESTAR to discriminate in providing programming access to distributors that compete against these cable MSOs were addressed in 1994, before the Commission issued its Notice of Proposed Rulemaking in IB Docket No. 95-168. As such, these issues were well understood when the Commission last addressed whether there is a need for a cable/DBS cross-ownership ban and decided against imposing any such restrictions. In fact, PRIMESTAR's track record as an aggressive competitor and innovator in DTH satellite service demonstrates that the imaginary horribles underlying the consent decrees were unfounded. Therefore, DIRECTV and EchoStar's attempts to use the issue of program access -- an issue that is clearly resolved -- to justify a cable/DBS cross-ownership ban, are disingenuous at best.

Third, as fully discussed in PRIMESTAR's prior submissions, given PRIMESTAR's ownership structure, composed of five different cable entities with geographically and economically divergent interests, and the uniform pricing and marketing policies employed by PRIMESTAR, it is impossible for PRIMESTAR to be marketed selectively in an effort to protect individual cable interests.[19] Indeed, with the new PRIMESTAR corporate structure and independent management, each of the cable operator investors will have much less involvement

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[18]47 U.S.C. § 548.

[19]PRIMESTAR's Memorandum Summarizing Petitioners' Arguments and Responses Thereto, filed January 23, 1998, pp. 7-15.

with the operation and marketing of PRIMESTAR than in the past. When a DBS operator is so organized as a publicly traded corporation, with conventional public company equity and where the management of the potential DBS operator is separate from that of its cable owners, there is simply no basis for the Commission to restrict ownership of the DBS operator merely because certain cable operators are investors.

Fourth, the Commission envisions the cable/LMDS cross-ownership ban as a short-term, three year restriction intended to protect LMDS during its infancy.[20] By contrast, while still relatively new, DBS companies such as DIRECTV and EchoStar are already thriving entities with substantial subscriber bases. Thus, it is not appropriate to apply the framework for the developing LMDS service to the established DBS service. In addition, cable's expertise has already been acknowledged as invaluable to DBS; in approving the DBS license of Tempo Satellite, then a wholly-owned subsidiary of TCI, in 1992, the Commission recognized the procompetitive benefits of enabling an experienced cable entity to provide high quality satellite service.[21]

In sum, the arguments for a cable/LMDS cross-ownership ban do not apply to the DBS arena. Insofar as LMDS is relevant to this proceeding, its relevance ought to be confined to providing evidence that a ban on cable/DBS cross-ownership is ill-considered. LMDS is merely one more demonstration of the increasing number of players -- along with MMDS, SMATV, FSS, OVS and TVROs -- offering competing options for video programming delivery.[22]

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[20]The LMDS order limits cable companies and LECs from entering the LMDS service for three years after the effective date of the LMDS rules, after which time the Commission will reexamine the need for the restriction. LMDS Order at ¶ 160.

[21]*TEMPO Satellite, Inc.* ("TEMPO II"), 7 FCC Rcd 2728, 2732 (1992).

[22]NCTA comments at 9.

c. Horizontal Concentration is Not a Sufficient Basis to Support Adoption of a Cable/DBS Cross-Ownership Ban

To the extent the Commission's primary concern is horizontal concentration among MVPD providers, the Commission should be mindful that courts have consistently found similar MVPD ownership limitations to be unconstitutionally overbroad from a First Amendment perspective. In *Daniels Cablevision v. U.S.*, the court found Section 11(c) of the 1992 Cable Act, which directed the Commission to promulgate a horizontal ownership rule placing a limit on the number of cable systems in which a given entity could hold an "attributable interest," to be constitutionally infirm.[23] The court found that such a restriction on a cable operator's ability to reach a potential nationwide audience outside of its limited subscriber base, without leaving open other means to reach this audience, did not survive a First Amendment analysis.[24] On similar grounds, prior to adoption of the Telecommunications Act of 1996, numerous federal courts from different circuits held that a blanket telco/cable cross-ownership ban was unconstitutionally overbroad despite, as here, arguments that the ban was necessary to promote competition and to prevent anti-competitive practices of the restricted entities.[25] These courts uniformly invalidated

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[23] *See Daniels Cablevision, Inc. v. U.S.*, 835 F. Supp. 1, 10 (D.D.C. 1993)("Daniels"), aff'd in part *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

[24] *Id.* ("Any governmentally ordained quota on the number of subscribers a cable operator may reach leaves the operator with absolutely no intra-medium means of speaking to the remainder of its potential audience. The First Amendment protects the right of every citizen to reach the minds of any willing listeners and, thus, the speaker's opportunity to win their attention.")

[25] *See, Chesapeake & Potomac Tel. Co. of Virginia v. U.S.*, 42 F.3d 181 (4th Cir. 1994); *U.S. West, Inc. v. U.S.*, 48 F.3d 1092 (9th Cir. 1995); *Pacific Telesis Group v. U.S.*, 84 F.3d 1153 (9th Cir. 1996); *BellSouth v. U.S.*,868 Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v. U.S.*, 867 F.Supp. 721 (N.D.Ill 1994); *Southern New England Telephone Co. v. U.S.*, 886 F. Supp 211, 214 (D. Conn. 1995).

such a blanket restriction because it deprived a protected class of speakers the ability to engage in a particular mode of communications with listeners of their choosing and therefore unquestionably failed intermediate scrutiny.

Adoption of a cable/DBS cross-ownership ban would be constitutionally indistinguishable from a First Amendment standpoint in that it would likewise limit a cable operator's ability to reach a potential nationwide audience by flatly depriving it of an efficient technology to deliver video services to subscribers outside of its cable franchise area.[26] Such a restriction would thereby burden substantially more speech than necessary without leaving open ample alternative means for cable operators to reach this potential audience, and therefore would also be unconstitutional.

d. The Commission Should Not Use This Proceeding to Rehash Arguments Pertaining to the PRIMESTAR Applications

Several commenters appear eager to use this rulemaking to revisit their positions in the PRIMESTAR application proceeding.[27] Such an approach is unjustified and disingenuous. The Commission should not now allow PRIMESTAR's competitors to use this proceeding to rehash the arguments relating to or further forestall action on the PRIMESTAR applications. As these parties have had a full and fair opportunity to present their arguments in the proceeding itself, and as the Commission has repeatedly determined that an outright cable/DBS cross-ownership ban is unwarranted,[28] the PRIMESTAR applications are now fully ripe for action and should be acted on

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[26]*See U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

[27]*See, e.g.*, EchoStar Comments at 5-7, DIRECTV Comments at 10.

[28]The Commission has specifically addressed the issue of a cable/DBS cross-ownership ban three times since 1982, and has never imposed such a restriction on the control or ownership

with due dispatch. The record in this proceeding clearly establishes the desirability of a case-by-case review of DBS horizontal ownership issues, rather than a blanket prohibition on cable/DBS cross-ownership. Thus, to reap the benefits of such a case-by-case analysis, the merits of the PRIMESTAR applications should be addressed in the pending application proceedings, and such matters are simply irrelevant in the context of this rulemaking.

II. The Commission Should Retain Flexibility To Address Potential Foreign Control Of DBS Licensees.

As several parties to this proceeding correctly point out, throughout its history of DBS regulation, the Commission has endeavored to retain maximum flexibility to deal with this rapidly evolving service. The desire to maintain flexibility is, in itself, a compelling reason to reject a rigid across-the-board cable/DBS cross-ownership ban, and instead address DBS horizontal ownership issues on a case-by-case basis. Similarly, the Commission should retain maximum flexibility to address issues relating to foreign control of DBS licensees which may arise in the future on a case-by-case basis.

In this regard, the NPRM in this proceeding proposes to move Section 100.11 of its rules, verbatim, into a new Section 25.146(a), which would apply only to DBS licensees.[29] Significantly, however, the Commission apparently does not intend in this proceeding to attempt to resolve the more difficult issue of whether Sec. 310(b) of the Communications Act mandates

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of DBS licenses. *See, Inquiry into the Development of Regulatory Policy in regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference* (Report and Order), 90 FCC 2d 1341, ¶ 91 (1982); TEMPO II, *supra,* at ¶ 10; *Revision of Rules and Policies For the Direct Broadcast Satellite Service* (Report and Order) ("Auction Order"), 11 FCC Rcd 9712 (1995).

[29] *In the Matter of Policies and Rules for the Direct Broadcast Satellite Service* (Notice of Proposed Rulemaking), IB Docket No. 98-21 (rel. February 26, 1998) at ¶¶ 20-21.

foreign ownership restrictions on all DBS licensees, regardless of whether they offer service on a subscription, broadcast, common carrier, or other basis.

Given the desirability of maintaining flexibility, Time Warner supports this approach. Foreign ownership issues should be examined on a case-by-case basis, allowing a careful analysis of the unique facts of each situation. Moreover, the Commission should reaffirm that even if Sec. 310(b) of the Act does not mandate foreign ownership restrictions on DBS licensees operating on a subscription basis, the Commission nevertheless retains discretion to consider foreign ownership issues as part of its general public interest mandate applicable to all licensing proceedings. For example, the Commission has previously conducted proceedings to determine whether it should apply alien ownership restrictions to the ownership of cable systems.[30] The Commission declined to adopt such limits in 1976, but noted that it would continue to review alien ownership trends with an eye toward reconsidering its decision should future circumstances warrant.[31] The Commission emphasized that it would have jurisdiction to adopt such ownership restrictions in the future:

> There are those who have asserted that the Commission would be overstepping its jurisdictional bounds if it were to adopt the proposed rule . . . . Although the decision has been made not to adopt the ownership restrictions, this in no way represents a concession that the Commission lacks jurisdiction.[32]

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[30]*See Report and Order* in Docket No. 20621, 37 RR 2d 495 (1976).

[31]*Id.* at 501.

[32]*Id.*

> Even in the absence of a specific Congressional directive on this matter, the Commission has general statutory responsibilities in the granting of radio authorizations . . . which we believe mandate consideration of whether restrictions on foreign ownership . . . should be adopted.[33]

In particular, even if the Commission concludes that the traditional statutory policies underlying Section 310(b) of the Act are inapplicable to subscription DBS, the Commission should nevertheless retain the discretion to review DBS license applications in light of current Commission policies relating to foreign ownership. When Section 100.11 of the FCC rules was initially adopted, the only articulated rationale underlying the statutory foreign ownership restrictions was the policy, dating to the Radio Act of 1927, of limiting alien influence and control for reasons of national security.[34] In 1995, however, the Commission adopted an analysis regarding alien ownership under the statute reflecting an additional underlying policy -- promotion of international competitive opportunities. Specifically, in deciding whether to permit foreign investment in licensees of common carrier radio facilities in excess of the Section 310(b)(4) benchmarks, the Commission began examining whether the alien owners' home markets offer effective competitive opportunities to U.S. entities -- the so-called "ECO" test.[35]

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[33]*Id.* at n.10.

[34]*See Market Entry and Regulation of Foreign-Affiliated Entities* (Notice of Proposed Rulemaking), IB Docket No. 95-22, 10 FCC Rcd 4844 (1995) at ¶ 16 and n.16.

[35]*Market Entry and Regulation of Foreign-Affiliated Entities*, 11 FCC Rcd 3873 (1995) ("Market Entry Order") at ¶ 2. Similarly, as part of its public interest analysis under Section 214 of the Communications Act, the Commission will examine whether effective competitive opportunities exist for U.S. carriers in the destination markets of foreign carriers seeking to enter the U.S. international services market through affiliation with a new or existing U.S. carrier. *Id.*

In its Market Entry Order, the Commission set out three goals of its regulation of the U.S. international telecommunications market. These include:

1) to promote effective competition in the global market for communications services;

2) to prevent anticompetitive conduct in the provision of international services or facilities; and

3) to encourage foreign governments to open their communications markets.[36]

Thus, the Commission's goals in that proceeding not only were to promote competition in the U.S. telecommunications market, but to use the licensing process to open the closed markets of other countries to U.S. companies:

> Effective competition means competition among service providers in a market that benefits consumers by expanding service offerings, promoting development of innovative technology, and lowering prices. We do not believe that effective competition will occur if foreign carriers that continue to hold market power in foreign markets are allowed unlimited access to the U.S. market. We seek to ensure the public interest benefits of effective competition through application of public interest criteria that consider the availability of opportunities for all U.S. carriers to innovate in the provision of international services, including through entry to foreign markets, and that limit the ability of dominant foreign carriers to leverage their market power into the U.S. international services market. We believe that our new standards may also encourage other countries to remove barriers to competitive entry in their international telecommunications services markets.[37]

In addition to such competitive concerns, the Commission's ECO test allows for consideration of other public interest factors such as national security, foreign policy and trade

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[36] *Id.* at ¶ 6.

[37] *Id.* at ¶ 1.

issues which may be brought to the Commission's attention by the Executive Branch.[38] Based on the conclusion of the World Trade Organization Basic Telecommunication's Agreement ("WTO Agreement"), and the United State's participation in that agreement, the Commission abandoned the ECO test for participation in the domestic telecommunications market for foreign carriers from WTO signatory countries.[39] The Commission reasoned that because the WTO Agreement's open entry standard provided comparable protections as the ECO test, application of the ECO test was no longer necessary regarding such carriers.[40] Significantly, however, the Commission did not abandon the ECO test for foreign carriers from non-signatory countries, finding that the ECO test continues to serve the public interest as to carriers from non-WTO member countries.[41]

In a related proceeding, the Commission proposed to adopt a similar effective competitive opportunities test for satellite services ("ECO-Sat").[42] Under that proposal, a satellite system that is not licensed by the U.S. would be allowed to provide services to and from the U.S. to the

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[38]*Id.* at ¶ 3.

[39]*In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities* (Report and Order and Order on Reconsideration), IB Docket Nos. 97-142, 95-22, FCC No. 97-398 (rel. Nov. 26, 1997) at ¶¶ 76-86.

[40] *Id.*

[41]*Id.* at ¶¶ 124-132.

[42]*Amendment of the Commission's Regulatory Policies To Allow Non-U.S.-Licensed Space Stations To Provide Domestic and International Satellite Service In The United States* (Notice of Proposed Rulemaking), IB Docket No. 96-111, FCC 96-210, released May 14, 1996.

extent that its home market and "route markets" allow effective competitive opportunities for U.S. satellite systems to provide analogous services.[43] The ECO-Sat policy was designed to:

> encourage foreign governments to open their satellite communications markets, thereby enhancing competition in the global market for satellite services.[44]

As with the ECO test, the Commission would consider other public interest factors such as Executive Branch concerns regarding foreign policy and trade under the proposed ECO-Sat policy.[45]

Similar to its approach relating to the ECO test, upon conclusion of the WTO Agreement, the Commission revisited its ECO-Sat proposal, and determined that such a policy is unnecessary for WTO signatory countries, but that an ECO-Sat test should be applied to non-U.S. satellites licensed by non-WTO countries:

> This approach is necessary to ensure that participants in the global satellite services market are on equal footing and that applicants from non-WTO countries are not able to distort competition to the detriment of U.S. operators. Fair and vigorous competition among multiple providers leads to lower prices and more innovative service offerings for satellite communications users in the United States and throughout the world. Applying the ECO-Sat test will confirm that foreign markets do not have *de jure* or *de facto* barriers that impede opportunities for U.S. providers to enter and compete in those markets prior to permitting operators from such countries to compete in the United States.[46]

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[43] *Id.* at ¶¶ 1-2.

[44] *Id.* at ¶ 1.

[45] *Id.* at ¶ 12.

[46] *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States* (Report and Order), IB Docket No. 96-111 (rel. Nov. 26, 1997) ("Satellite Entry Order") at ¶ 72.

Moreover, in recognition of the fact that U.S. trade negotiators reserved a most favored nations ("MFN") exemption for direct-to-home ("DTH") satellite services in the WTO Agreement, the Commission determined that the ECO-Sat test should apply to any requests involving provision of DTH, DBS and DARS by non-U.S. satellites, even those licensed by WTO member countries:

> [T]he U.S. Schedule of Specific Commitments to the WTO Basic Telecommunications Agreement excludes DTH, DBS, and DARS. Many other WTO Members, including many of the United States' major trading partners, did not include these services in their market access commitments, creating a potential market imbalance. To resolve this imbalance, the United States made no market access or national treatment commitments and took an MFN exemption for these services.
>
> Thus, because the WTO Basic Telcom Agreement will not do as much to advance our goal of promoting a competitive satellite marketplace for all these services, in the *Further Notice*, the Commission proposed to apply the ECO-Sat test to all requests for access by non-U.S. satellite systems for delivery of DTH, DBS, and DARS services into the United States.[47]

Given the laudable efforts by the Commission to encourage open foreign markets for U.S. firms seeking to offer communications services overseas, it was entirely appropriate for the Commission, in its Satellite Entry Order, to recognize the explicit exemption made in the WTO Agreement by the U.S. with respect to DBS services. This exemption was made as a direct result of the fact that certain foreign DBS and satellite programming markets are closed to U.S. DBS service providers and programmers. As a result of these barriers to entry by U.S. DTH and DBS providers in many foreign nations, the U.S. has sought to control foreign access to the U.S. DBS market through means of a reciprocal access or other mutual agreement with each foreign country involved. To fully accomplish this goal, however, the Commission must recognize that foreign

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[47] *Id.* at ¶¶ 94-95 (citations omitted).

access to DBS customers in the United States can occur not only through foreign DBS-licensed satellites transmitting programming into the U.S., the issue addressed in the Satellite Entry Order, but also through the U.S. DBS satellite and earth station licensing process, as well as the U.S. policies governing the use of these U.S.-licensed DBS facilities by foreign DBS providers.

Time Warner is a world leader in the export of intellectual property, much of which is the fruit of U.S. artists and authors. As such, Time Warner is an ardent supporter of efforts by the U.S. government to eliminate trade barriers and to open foreign markets to U.S. producers of intellectual property. The policy objectives of the U.S. in the WTO Agreement for specifically exempting DBS from the agreement are aimed at creating incentives for foreign nations to open their DBS and programming markets to U.S. firms. Thus, it is critical to the accomplishment of these objectives for the Commission adopt rules governing U.S.-licensed DBS satellites which allow foreign control of U.S.-licensed DBS capacity, regardless of whether that capacity is used for broadcast, subscription, or other types of authorized DBS satellite services, only if the home nation of such foreign company provides reciprocal competitive opportunities to U.S. firms.[48] Absent such a recognition, the U.S. Trade Representative's objectives in exempting DBS from the WTO Agreement will be easily circumvented through the FCC's own DBS regulatory policies. Moreover, adoption of the policy outlined above would effectuate the position of the Executive Branch, as set forth in the letter to Chairman Hundt dated November 26, 1996, expressing the

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[48]In at least one case, the International Bureau has applied the ECO-Sat test in evaluating a DBS licensing matter. *Loral Corporation Request For A Declaratory Ruling Concerning Section 310(b)(4) of the Communications Act of 1934 and R/L DBS Company for Assignment of Continental's Direct Broadcast Satellite Construction Permit* (Memorandum Opinion and Order), DA 97-725, 1997 FCC Lexis 2494, ¶ 8 (1997).

views of the Office of the U.S. Trade Representative, the Department of Commerce and the Department of State.

Conclusion

The Commission should not impose a general rule banning cable/DBS cross-ownership. Instead, the ownership structure of each DBS license applicant should be addressed on a case-by-case basis. The Commission should also retain maximum flexibility to address issues relating to foreign control of DBS licensees which may arise in the future on a case-by-case basis.

Respectfully submitted,

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